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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BERNADINE SUITUM,

Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES, NEVADA, ET AL., AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

INTEREST OF AMICI 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. PETITIONER'S CLAIM THAT A REGULATORY TAKING OCCURRED IS NOT RIPE FOR JUDICIAL REVIEW 6

II. SUITUM'S CLAIM IS SIGNIFICANTLY DIFFERENT FROM THE CLAIM IN *LUCAS* 11

A. SUITUM'S PROPERTY IS NOT VALUELESS 11

B. LAND USES CREATING A NUISANCE FALL WITHIN THE EXCEPTION TO THE CATEGORICAL TAKING RULE 13

CONCLUSION 19

TABLE OF AUTHORITIES

CASES Page

Agins v. City of Tiburon,
447 U.S. 255 (1980) 7, 10, 15

Andrus v. Allard,
444 U.S. 51 (1979) 8

Bliss v. Grayson,
24 Nev. 422, 56 P. 231 (1899) 17

Euclid v. Ambler Realty Co.,
272 U.S. 365 (1926) 14

Goldblatt v. Hempstead,
369 U.S. 590 (1962) 11

Gulf, Colo. & Santa Fe Ry. v. Reed,
80 Tex. 362, 15 S.W. 1105 (1891) 18

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) 7

Horn v. Seeger,
167 Kan. 532, 207 P.2d 953 (1949) 18

Kelly v. TRPA,
106 Nev. 638, 855 P.2d 1027 (1993) 2

Lake Country Estates v. TRPA,
440 U.S. 391 (1979) 14

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 6, 11, 12, 14, 16-18

MacDonald, Sommer & Frates v. Yolo County,
477 U.S. 340 (1986) 6, 9

TABLE OF AUTHORITIES—Continued

CASES—Continued Page

Miller v. Board of Public Works,
195 Cal. 477, 234 P.381 (1925) 14

Mugler v. Kansas,
123 U.S. 623 (1887) 14

Penn Central Transp. Co. v. City of New York,
438 U.S. 103 (1978) 8, 10, 15

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 (1922) 6

People v. Gold Run Ditch & Mining Co.,
66 Cal. 138, 4 P. 1152 (1884) 18

People V. Truckee Lumber Co.,
116 Cal. 397, 48 P. 374 (1897) 18

Pierce Oil Corp. v. City of Hope,
248 U.S. 498 (1919) 13

San Diego Gas & Electric Co. v. San Diego,
450 U.S. 621 (1981) 12

Southern Pac. Transp. Co. v. City of Los Angeles,
922 F.2d 498 (9th Cir.), *cert. denied*, 502 U.S. 498 (1990) 8

Suitum v. TRPA,
80 F.3d 359 (1996) 8, 9, 11, 12

Williamson County Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 7-9

Woodruff v. North Bloomfield Mining Co.,
18 F. 753 (9th Cir. 1884) 17

TABLE OF AUTHORITIES—Continued

STATUTES Page

NRS 277.190 3

NRS 277.200 3

Pub.L. No. 91-148, 83 Stat. 360 (Act of Dec. 18, 1969) 3

U.S. Const. amend. V 5

OTHER CITES Page

Bailey, *Land-Capability Classification of the Lake Tahoe Basin, California-Nevada: A Guide for Planning* (1974) 3

California State Water Resources Control Board, *Final Lake Tahoe Basin Water Quality Plan* (1983) 15

California Tahoe Conservancy, *A Report on Soil Erosion Control Needs and Projects in the Lake Tahoe Basin* (March 1987) 15

Fink, *Public Land Acquisition for Environmental Protection: Structuring A Program for the Lake Tahoe Basin*, 18 Ecology L.Q. 485 (1991) 2

Furgurson, *Lake Tahoe—Playing for High Stakes*, National Geographic (March, 1992) 2

Goldman and Byron, *Changing Water Quality at Lake Tahoe: The First Five Years of the Lake Tahoe Interagency Monitoring Program* (1986)..... 15

Pruetz, *Putting Transfer of Development Rights to Work in California* (Solano Press 1993)..... 10

Strong, *Tahoe: An Environmental History* (U. of Neb. Press 1984) 2, 16

INTEREST OF AMICI

Nevada, Hawaii, Vermont, Montana, and Maryland submit this brief as *amici curiae* in support of respondent Tahoe Regional Planning Agency (TRPA).

The *amici* states have a strong interest in regulations affecting land use planning, as well as transfer of development rights programs. The issues involved in the instant lawsuit are of great importance to these states as they attempt to plan for the future and control and direct development to provide for their citizens' health, welfare and other needs.

The Ninth Circuit's decision must be sustained in order to maintain traditional state authority in the area of land use planning, to protect and preserve transferable development rights programs and finally, but not least importantly, protect the water quality of Lake Tahoe.

STATEMENT OF THE CASE

Lake Tahoe, situated on the border between California and Nevada, is surrounded by the Sierra Nevada Mountains on the west and the Carson Range on the east. The Tahoe Basin comprises 192 square miles. While the lake accepts the runoff from melting winter snow and numerous small tributaries, it has one outlet, the Truckee River, which flows east to Nevada where it eventually empties into Pyramid Lake.

High in its alpine setting and the tenth deepest lake in the world, Lake Tahoe is eutrophying as the result of human development. Extremely clear with low concentrations of nutrients which support the growth of water-clouding algae, the lake is renowned for its stunning clarity. Until recently, Lake Tahoe had a 10,000-year history of near equilibrium in gain or loss of nutrients. Presently, Lake Tahoe is suffering an increase in algal productivity and a decline in clarity due to an elevated load of sediments and nutrients. As a result,

the lake is experiencing a loss in water quality. *See Kelly v. TRPA*, 106 Nev. 638, 641, 855 P.2d 1027, 1029 (1993).

The land surrounding the lake is held by private, federal and state owners. An early history of logging, mining, ranching and development has been replaced by a large and growing emphasis on tourism and recreational use. Commercial and residential development continue with some limitations. Located within hours of major population centers such as San Francisco, Sacramento, and Reno, the lake attracts millions of visitors and suffers from the same overuse problems that plague other urban recreational areas. Fink, *Public Land Acquisition for Environmental Protection: Structuring A Program for the Lake Tahoe Basin*, 18 Ecology L.Q. 485 (1991).

The Lake Tahoe Basin is also recognized as a natural resource, exceptionally vulnerable to the ravages of development:

> Tahoe's scenic beauty has been its undoing. Widespread commercial development to accommodate the crowds of people that flock to its shores has resulted in an alarming rate of environmental deterioration.

Strong, *Tahoe: An Environmental History*, (U. of Neb. Press 1984) at xiii. *See also* Furgurson, *Lake Tahoe--Playing for High Stakes*, National Geographic (March, 1992).

In 1974, Robert Bailey, a researcher with the United States Forest Service, was assigned to the Tahoe area to help TRPA find appropriate strategies for reversing the deteriorating environmental trends in the Basin. He then observed:

> Since the late 1950's, the Lake Tahoe basin has been subjected to rapid development for various purposes. This expansive growth has been

> responsible for many improper land development procedures, including failure to recognize hydrologic and topographic limitations, unnecessary and widespread destruction of vegetal cover, realignment and pollution of streams, encroachment on flood plains, and disruption of natural drainage . . . . *Deterioration has reached a point where human activities that induce sedimentation are probably the chief threat to environmental quality in the basin.*

Bailey, *Land-Capability Classification of the Lake Tahoe Basin, California-Nevada: A Guide for Planning*, (1974), at 1 (emphasis added).

In response to these and other problems, TRPA was created by a congressionally-approved, and state-ratified, Interstate Compact. Pub.L. No. 91-148, 83 Stat. 360 (Act of Dec. 18, 1969), NRS 277.190, to protect the natural resources of the Lake Tahoe Basin. The United States Congress, as well as the compacting states of California and Nevada, expressed in the Tahoe Regional Planning Compact that the Tahoe region exhibits unique environmental and ecological values which are irreplaceable. They stated there is public interest in protecting, preserving, and enhancing these values for the residents, as well as visitors to the region, and that the waters of the lake are threatened with deterioration or degeneration, which endanger both the natural beauty and economic productivity of the region. They concluded that responsibility for preserving scenic and natural areas is divided between local governments, regional agencies, both states, and the federal government. Tahoe Regional Planning Compact, Article I(a), codified at NRS 277.200.

Upon creation, the agency began a process by which it categorized all the land in the basin. In 1980 major amendments were adopted by way of the Tahoe Regional

Planning Compact. Finally, in 1987 the TRPA issued its Code of Ordinances to implement its regional plan for the basin.

The key challenge for TRPA was to develop a regional plan which could somehow cope with incessant demands for additional growth and development in a region already suffering from a lack of resource capacity to handle *existing* development. Of particular concern were thousands of single-family lots created years ago without regard to environmental constraints.

Among other criteria, the Code of Ordinances established and defined stream environment zones (SEZ) as land where evidence of surface water flows, riparian vegetation, near surface ground water, or alluvial soils exist. The boundaries of the SEZ are set, and no new development is allowed in a delineated SEZ. The purpose of identifying the SEZ is to prevent non-point source pollution and thereby protect the water quality of Lake Tahoe.

Based on site specific investigations, numeric values were assigned to lots based on location, slope, vegetation, and drainage. A score was established above which building on a lot was permitted and below which it was prohibited. For lot owners with restricted parcels a system was developed to allow them to purchase or sell transferable development rights (TDR).

Generally, TDR programs envision severing development potential from land, treating it as a commodity, and selling this potential. These programs were created to allow lands, like those within TRPA's jurisdiction, a means of providing an economic return to their owner. These programs have become widespread, encouraging farmland preservation, historic preservation, open space, and environmental protection. The programs rest on the marketability of TDRs.

The TDR program, developed by TRPA, involves three components: transfer of land coverage, transfer of residential development rights and transfer of residential allocations. Numerous transfers of these components have been approved as a result of TRPA's 1987 Regional Plan. Once the transfer occurs, the transferring parcel is then retired from availability to develop. The acquiring parcel is benefitted by having use of the transferred rights.

Petitioner filed a Complaint that alleged the TRPA's land use regulations have resulted in an unconstitutional regulatory taking of her property in violation of the Fifth Amendment to the U.S. Constitution. Specifically she claims that since her lot is located in a SEZ it is valueless. However, Petitioner failed to determine the value of the TDRs she possessed.

SUMMARY OF ARGUMENT

Petitioner Suitum's claim should be denied for the following reasons. Petitioner's claim is not ripe because she failed to obtain a final decision from the TRPA, the regulatory agency which enacted the land use regulations of which she complains, before commencing her action. While residential development was prohibited on her lot, she failed to fully investigate the value of the TDRs she possessed by virtue of property ownership. She also failed to attempt to obtain from the county a residential allocation which would have value as well.

The TDRs Petitioner has are a "use" of the property and therefore no taking has occurred. Since development rights can be bought and sold they have value. The value of the development rights was never determined by Petitioner. Because of her failure to do this, and the testimony presented by Respondent TRPA, the Ninth Circuit was correct in concluding the TDRs had significant value.

There is an important distinction between this case and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, there was a finding by the trial court that Lucas's property was valueless. In this case, there is no such finding. Petitioner simply asserts her property has no value.

Further, in *Lucas* the Court held that a taking does not occur when the act prohibited by regulation would be prohibited by the state's common law of nuisance. The regulations that TRPA enacted regarding land use were specifically done to prevent water pollution from occurring. TRPA's actions to protect the waters of Lake Tahoe are consistent with the common law of nuisance and are therefore a legitimate exception to the categorical taking rule as stated in *Lucas*.

ARGUMENT

I. PETITIONER'S CLAIM THAT A REGULATORY TAKING OCCURRED IS NOT RIPE FOR JUDICIAL REVIEW.

This Court noted in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986), that a regulatory takings claim has two components. First, the aggrieved party must establish that the regulation has in substance "taken" his property; and second, he must demonstrate that any proffered compensation is not "just."

To make a determination of the first factor, the Court stated it will look to see if the questioned regulation "goes too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). This criterion as explained by Justice Holmes has become the standard in regulatory takings analysis. A court is unable to determine if a regulation has "gone too far" unless it knows how far the regulation goes. Therefore,

> [a] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.

Williamson County Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985). Before a determination can be made regarding how far a regulation goes, a court must make an initial inquiry to determine if the plaintiff's claim is ripe for decision.

Beginning with *Agins v. City of Tiburon*, 447 U.S. 255 (1980), this Court has applied ripeness rules to "taking" litigation. In *Agins*, plaintiffs claimed that a land use regulation had taken their property. The city ordinance permitted one to five single-family residences on plaintiffs' land and required the submission of a development plan so that the city could determine how many residences it would allow within this range. The Court remanded the case because plaintiffs had failed to submit the required development plan. *See also Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (Court dismissed a taking attack on federal surface mining act because plaintiff had not presented concrete controversy or sought variance or waiver from the act's provisions).

The ripeness rule was then further clarified in *Williamson County*, 473 U.S. at 172. The regional planning commission had approved a preliminary residential subdivision development. However, a few years later, the commission refused to approve a revised subdivision plat. By the time the revised subdivision plat was submitted, the zoning ordinance had been revised to reduce the total number of residential units permitted. The Court held it could not evaluate the takings claim until the administrative agency had arrived at a "final definitive position." Secondly, the Court decided the case was

not ripe because the developer had failed to avail itself of a state statute that authorized compensation awards in inverse condemnation actions. The second prong of *Williamson County* is not at issue here because there is no taking.

The "final decision rule" is at issue in this case. The Ninth Circuit Court determined that Petitioner failed to show that before filing suit she sought a final decision from TRPA as to the application of its regulations to her property. Specifically, Suitum did not pursue the transfer of development rights before filing suit. The circuit court found that "[b]y failing to apply to the TDR program, Suitum denie[d] TRPA the ability to grant a 'different form [ ] of relief . . . which might abate the alleged taking.'" *Suitum v. TRPA*, 80 F.3d 359 (1996) at 362, *citing*, *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 503 (9th Cir.), *cert. denied*, 502 U.S. 498 (1990). Without attempting to transfer the rights she possesses, Suitum cannot know the nature and extent of the permitted development. Because she failed to do this, the court was unable to assess the full economic impact or the degree of the regulations' interference with reasonable investment-backed expectations.

Previously, in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 103 (1978), this Court held that a landowner is not denied economically viable use of property unless the regulation does not allow any reasonable use of the property. Reasonable investment-backed expectations, also a taking factor introduced in *Penn Central,* requires a court to consider the bundle of rights that constitute property ownership. This Court has not held that a regulation that limits or destroys "one strand" from the bundle is a taking. *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979). Prohibiting construction, a traditional "use," would be one such lost "strand." Another important strand from that bundle is the right of alienation. It is this right that Suitum retains by either selling her property outright or by separating the development rights from it and selling them. Finally, *Penn Central* held that a landowner cannot

claim a taking because a regulation interferes with her "ability to exploit" a property interest she believed was available for development. *Penn Central*, 483 U.S. at 130.

In *Williamson County*, 473 U.S. at 200, the Court acknowledged the difficulty of determining if a regulation goes too far and concluded,

> [R]esolution of that question depends . . . upon an analysis of the effect the . . . regulations had on the value of [the] property and investment-backed profit expectations.

The circuit court analyzed the value of Suitum's development rights between $10,000 and $21,500, and with "an allocation right the value increases by approximately $30,000." *Suitum*, 80 F.3d at 363. Since Suitum failed to determine the market value of her TDRs, she prevented the court from analyzing the program's effect on "investment-backed profit expectations."

The Ninth Circuit recognized that one purpose of the TDR program was to facilitate alternative uses of the property. The court rightly concluded that the TDR program was a "use" of Petitioner's property in that the inquiry was on "any reasonable beneficial use." *Suitum*, 80 F.3d at 363, *citing*, *MacDonald*, 477 U.S. at 349. The circuit court concluded that, although unusual, the fact that Suitum was transferring development rights from her property and not making a reapplication of development plans for her property was immaterial. Both procedures would provide finality as to the value of the property.

Suitum responded by arguing it would be futile to engage in the TDR program because it was "a sham." The circuit court found no merit in the Petitioner's claim that the TDR program was a sham. In fact, the circuit court found "significant value" in her TDRs. *Suitum*, 80 F.3d at 363.

First, contrary to Petitioner's claim, there is a genuine market for the sale and purchase of TDRs in the Tahoe Basin. Petitioner failed to present credible testimony to the trial court that the TDR program was a ruse or that even if she engaged in it, her property would be valueless. Suitum simply speculates the value of the TDRs would be inadequate or nonexistent and therefore she should not have to bother determining such value.

Secondly, TDR programs are a well-established and effective method for land use planning. These programs operate at the local level so communities can achieve a wide variety of land use goals. As this Court has previously noted in *Agins*, 447 U.S. at 262, local communities have an "interest[] in assuring orderly development of residential property with provision for open-space areas." An important element in the development of these local TDR programs is that they provide property owners with increased flexibility and options, as compared to traditional "prescriptive" land use regulatory programs. Landowners can receive market value for sales of development rights and "receiving" landowners can obtain opportunities for additional development.

Currently, TDR programs are working effectively in many states. Foremost is New York City's TDR ordinance which was the subject of the decision in *Penn Central*. The States of New York and New Jersey both have programs to protect their pinelands. Collier County, Florida, has a TDR program to protect wetlands and open space. Finally, California has made extensive use of local TDR programs. *See* Pruetz, *Putting Transfer of Development Rights to Work in California* (Solano Press 1993).

This Court in *Penn Central* upheld the denial of a building permit to construct an office tower above a railroad terminal. *Id.* at 137. The Court observed the TDRs did have value and served to mitigate the effects of the historic preservation law. The Ninth Circuit acknowledged that

TRPA's regulations provide for a use of what could be undevelopable property. The court stated, "transfer of development rights is a use of SEZ property." *Suitum*, 80 F.3d at 363. TDRs comprise an essential component of the value of the property because they constitute an economic use to which the property may be put.

The Petitioner alleges that TRPA's application of its regulations amounted to a taking in that she was deprived of *any* use thereof. It is true Suitum is prevented from building a house on the property because of the property's SEZ classification. However, denying a landowner a particular use of her property does not in itself rise to a takings claim. The fact that a *particular* use denied by government may also be the most beneficial in the eyes of the landowner does not render the regulation unconstitutional. *Goldblatt v. Hempstead*, 369 U.S. 590, 592 (1962).

II. SUITUM'S CLAIM IS SIGNIFICANTLY DIFFERENT FROM THE CLAIM IN *LUCAS*.

There are two important factors in Suitum's case that differentiate it from *Lucas*. First, there is no finding that Suitum's property is valueless. This is a critical distinction between this case and *Lucas*. Second, *Lucas* permits an exception to the categorical takings rule where the land use is proscribed based on state common law. The historically recognized common law of nuisance prohibits actions which cause water pollution.

A. SUITUM'S PROPERTY IS NOT VALUELESS

In *Lucas*, 505 U.S. 1003, the Court described two discrete categories of regulatory action as generally compensable without the need to make case specific inquiry into the public interest advanced. These it described as categorical taking. Neither the first category, regulation that compels a

property owner to suffer a physical "invasion" of her property, nor the second category, regulations denying the property owner "all economically beneficial or productive use of land," *Id.* at 2893, is at issue here. The *Lucas* Court relied on the suggestion of the dissent in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting), "that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." This Court determined that a total denial of all use is a taking even if the purpose of the regulation is to prevent a harm rather than confer a public benefit.

Of critical importance in *Lucas* was the trial court's finding that the lots owned by Lucas had been rendered valueless. In the present case the trial court has made no such determination. Indeed, on appeal the Ninth Circuit specifically concluded that Suitum failed to ascertain the value of her property by "apply[ing] for the transfer of her development rights through the TDR program . . ." *Suitum*, 80 F.3d at 364. Suitum argues that since she cannot build a house on her property it is therefore valueless, an argument without merit by virtue of her failure to investigate the value of her TDRs.

The concurring opinion in *Lucas*, 505 U.S. at 1033-34, acknowledged the finding "that a beachfront lot loses all value because of a development restriction" as "curious." There is no finding Suitum's lot is valueless. The circuit court found Petitioner presented no evidence as to the value of her land. It would appear equally curious that property in the Lake Tahoe Basin is rendered valueless because of a development restriction.

Suitum argues that she could have constructed a house on the property at the time she bought it but cannot now do so because of TRPA's regulations. In *Lucas*, 505 U.S. at 1031, the Court stated "changed circumstances or new knowledge may make what was previously permissible no longer so." This is consistent with the Court's prior holding

in *Pierce Oil Corp. v. City of Hope*, 248 U.S. 498 (1919), in which Justice Holmes stated:

> [A] business lawful today may in the future, because of the changed situation, growth of population or other causes, become a menace to the public health and welfare, and be required to yield to the public good.

Id. at 500.

The TRPA's action does not restrict Suitum's right to dispose of her property. It is only a declaration that its use for certain purposes is prejudicial to the public interest. The power which the states have to prohibit use by individuals of their property in ways harmful to the health, morals, or safety of the public, is not, and consistent with the existence and safety of organized society, cannot be burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain by reason of their not being permitted to inflict injury upon the community at large.

B. LAND USES CREATING A NUISANCE FALL WITHIN THE EXCEPTION TO THE CATEGORICAL TAKING RULE

Land use planning has a long history of regulating development to satisfy the competing needs of communities. TRPA has enacted land use controls to respond to changes in the environment ans to attempt to solve environmental problems at Lake Tahoe. TRPA's actions are consistent with historical common law prohibitions of nuisance.

Comprehensive land use regulation, as a constitutionally valid method for regulating the uses to which an owner might put his real property, is rooted in the late teens and early twenties of this century. The first comprehensive zoning

ordinance in the United States was enacted in 1916 in the City of New York. *See Miller v. Board of Public Works*, 195 Cal. 477, 485, 234 P. 381, 383 (1925). During the following nine years, a bulletin of the United States Department of Commerce showed that 35 states and the District of Columbia had adopted this form of regulation. Pursuant to those comprehensive land use regulations, 221 municipalities had been zoned and over 22,000,000 inhabitants, aggregating 40 percent of the urban population of this country, are living in zoned territory. *Id.* at 486. When the United States Supreme Court set its seal of approval upon the constitutionality of this new type of legislation in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the cycle was completed and comprehensive zoning had taken its place as a constitutionally recognized part of our legal and political system.

This Court has held that TRPA is a political subdivision of the state. *Lake Country Estates v. TRPA*, 440 U.S. 391, 401 (1979). Like other political subdivisions, it has the ability, as well as the obligation, to enact regulations that protect the health, morals, and safety of the people. The authority to protect the people arises from the state's police powers. Regulations properly enacted represent the exercise of this governmental power, and though their consequences may limit use of private property, their injunction does not constitute a taking within the meaning of the Constitution nor does it entitle the owner of such property to compensation from the state or its agents, or give him any right of action. *See Mugler v. Kansas*, 123 U.S. 623, 668 (1887) ("A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking. . .").

As Justice Kennedy's concurring opinion in *Lucas*, 505 U.S. at 1034, stated:

> The Takings Clause, while conferring substantial protection on property owners, does not eliminate the police powers of the State to enact limitations on the use of their property. [Citations omitted.]

Where a state "reasonably conclude[s] that 'the health, safety, morals or general welfare' would be promoted by prohibiting a particular contemplated use of land," compensation is not necessary. *Penn Central*, 438 U.S. at 125. As this Court has maintained, land use planning which advances a legitimate state interest will not effect a taking. *Penn Central* concludes that the goal of preserving a valuable cultural resource was a valid exercise of the police power. *Id.* at 129. As well, the Court in *Agins*, 447 U.S. at 261, found "Tiburon's zoning ordinance advanced legitimate state goals because it protected the city's residents from the ill effects of urbanization. "

The use proscribed by TRPA's actions is residential construction in a stream environment zone. Construction in such zones is contributing to the degradation of the waters of Lake Tahoe. Independent scientists who have studied Lake Tahoe for many years have concluded that: (1) the lake has lost approximately 23 feet of transparency over the last 20 years, with a present loss rate of 1.5 feet per year; (2) watershed runoff is the prime contributor to declining water quality; and (3) disturbance of soils in the watersheds of the Tahoe Basin is directly linked to the steady and increasing pollution to the waters of Lake Tahoe. (Goldman and Byron, *Changing Water Quality at Lake Tahoe: The First Five Years of the Lake Tahoe Interagency Monitoring Program* (1986) at 6-8; *See also* California Tahoe Conservancy, *A Report on Soil Erosion Control Needs and Projects in the Lake Tahoe Basin* (March 1987) at 9-13; and California State Water Resources Control Board, *Final Lake Tahoe Basin Water Quality Plan* (1983) at 77-79, 163-165.) Summarizing the urbanization of Lake Tahoe that has occurred in recent years, one observer noted:

> As a result of this urban boom, all aspects of environmental quality within the Tahoe Basin declined. . . . Marshes and meadowlands, the habitat of many wildlife species, increasingly succumbed to the bulldozer. Even more alarming, the crystal-clear waters of Lake Tahoe revealed signs of increased pollution in spite of the introduction of a modern sewage disposal system that pumped effluent out of the basin. The growth of algae in the lake appeared to be increasing at an exponential rate, and the clarity or its water lessened.

Strong, *Tahoe: An Environmental History* at 196.

TRPA's action demonstrates a responsible approach in the development of laws and policies, which are responsive to rapid changes in the physical environment and to newly acquired knowledge about the environment, to attempt to solve the environmental problems confronting the lake. TRPA is obligated to deny uses which might have been permissible in the past before man's actions made everyone aware of civilization's potential for destruction of the natural environment.

The Takings Clause does not require a static body of state property law, but rather the state should be permitted to enact new land use regulations in response to changing conditions. *See Lucas*, 505 U.S. at 1035.

While the holding in *Lucas* rejects the reliance on a legislature's recitation of a "noxious use" as justification for departing from the "categorical takings rule," it did clarify that there is no taking when the proscribed use was already prohibited by the owner's property title or the state's common law. *Lucas*, 505 U.S. at 1029.

This Court conditioned the categorical taking rule explaining that a regulation that results in a total taking will nonetheless be upheld if it does

> no more than duplicate the result that could have been achieved in the courts . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

Lucas, 505 U.S. at 1029.

Nevada's Supreme Court recognizes that common law nuisances include that class of wrongs caused by unreasonable, unwarrantable, or unlawful use by a person of his own property, or by his improper, indecent, or unlawful conduct which operates as an obstruction or injury to the rights of another, or to the public, and which produces such material annoyance, inconvenience, discomfort, or hurt that the law presumes consequent damage. *Bliss v. Grayson*, 24 Nev. 422, 56 P. 231 (1899).

The causal relationship between development of sensitive lots and the pollution of Lake Tahoe's unique waters is thoroughly documented and is undisputed in this case. Indeed, the second of the two specific examples cited in *Lucas* as illustrations of land use regulation that would pass constitutional muster, even if the impact were to totally destroy a private parcel's economic value, was development activity on a private lakeshore parcel that floods adjoining property. *Lucas*, 505 U.S. at 1029. The parallel between that hypothetical and the case of lake pollution caused by adjacent development is obvious. For over one hundred years federal and state courts have found it within government's legitimate power to abate nuisances to prevent upland development activities that trigger pollution of adjacent waterways. *See, e.g., Woodruff v. North Bloomfield Mining Co.*, 18 F. 753 (9th Cir. 1884);

People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 4 P. 1152 (1884); *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 P. 374 (1897); *Gulf, Colo. & Santa Fe Ry. v. Reed*, 80 Tex. 362, 15 S.W. 1105 (1891); *Horn v. Seeger*, 167 Kan. 532, 207 P.2d 953 (1949).

Petitioner's claim falls squarely in the *Lucas* exception based on clearly developed historical antecedents founded in the common law of nuisance. Instead of being newly legislated, TRPA's authority for action is inherent in Suitum's property title. Such authority stems from the background principles that federal and state common law of property and nuisance already place upon land ownership.

Common law principles do not permit a landowner from engaging in activities that spread contamination. Whatever rights a landowner may have, it is difficult to imagine a right to pollute would be one of them. A property owner cannot expect to put property to a use that creates a nuisance even if that is their preferred use. Creating a nuisance was never part of the owners "bundle of rights." Thus it is unreasonable for a landowner to expect such uses would never be formally prohibited.

CONCLUSION

The judgment of the circuit court should be affirmed. The Court should hold that a regulatory taking did not occur.

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Respectfully Submitted,

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